

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

JAMES GAINFORTH #179409,

Petitioner,

Case No. 2:10-CV-87

v.

HON. GORDON J. QUIST

CATHERINE BAUMAN,

Respondent.

ORDER REJECTING REPORT AND RECOMMENDATION

The Court has before it Petitioner's Objections to Magistrate Judge Greeley's Report and Recommendation recommending that Petitioner's habeas petition be dismissed as barred by the one-year statute of limitations. The magistrate judge concluded that Petitioner's application is barred by the one-year period set forth in 28 U.S.C. § 2244(d)(1)(A) because Petitioner failed to file his petition within the one-year grace period that expired on April 24, 1997. The magistrate judge further concluded that Petitioner is not entitled to equitable tolling.

After conducting a *de novo* review of the Report and Recommendation, and having considered Petitioner's Objections and his petition, the Court concludes that the Report and Recommendation should be rejected. While the magistrate judge was correct that the petition is barred under § 244(d)(1)(A) and that Petitioner has failed to alleged sufficient facts to support equitable tolling, Petitioner notes that the magistrate judge failed to address or consider Petitioner's arguments in paragraph 19 of the petition that § 2244(d)(1)(D) provides the period of limitation in this case because the ballistics test obtained on May 11, 2006, constitutes new exculpatory evidence which Petitioner could not have discovered through the exercise of due diligence. Petitioner further

notes that the magistrate judge failed to address his assertion of actual innocence. These arguments were not, but should have been, addressed in the Report and Recommendation. Therefore,

IT IS HEREBY ORDERED that the Report and Recommendation of the magistrate judge, filed June 3, 2010, is **REJECTED**, and the petition is remanded to the magistrate judge to determine whether the petition is timely in light of Petitioner's arguments in paragraph 19 of his petition.

Dated: September 2, 2010

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE